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Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

NORTH AMERICAN FUND MANAGEMENT CORPORATION d/b/a NORAMTRUST U.S.A., et al.
Petitioners,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION
Respondent.

On Petition for Writ of Certiorari to
The United States Court of Appeals
For the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER THE COURT OF APPEALS ERRED BY RELYING UPON FSLIC AND FDIC DEPOSIT INSURANCE COVERAGE DETERMINATIONS AND INTERPRETATIONS WHICH CONTRADICTED THE PLAIN MEANING OF ENABLING STATUTES AND LEGISLATIVE REGULATIONS.

II. WHETHER THE COURT OF APPEALS ERRED BY RELYING UPON FSLIC'S MANUAL FOR AN INTERPRETATION OF "OWNER" WHICH CONTRADICTED THE PLAIN MEANING OF "OWNER" AS SET FORTH IN THE ENABLING STATUTES AND THE PROMULGATED LEGISLATIVE REGULATIONS IN 12 C.F.R. AND WHICH MANUAL ALSO CONTAINED A VAGUE PROCEDURAL REQUIREMENT FOR "EXTRINSIC EVIDENCE."

LIST OF PARTIES TO THE PROCEEDING IN THE COURT BELOW

The following are the names of all parties to the proceeding in the United States Court of Appeals for the District of Columbia Circuit.

North American Fund Management
Corporation, d/b/a Noramtrust
Berta Maria Bremond
Jeanette Bremond-Piquet
Isabelle Piquet
Nathalie Piquet
Nathalie Bertrand
Armand Bertrand
Jean Jardel
Jacques Jardel

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INSURANCE CORPORATION
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Argued March 25, 1993
Decided May 7, 1993.....A-1

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NORTH AMERICAN FUND MANAGEMENT CORPORATION d/b/a NORAMTRUST U.S.A., et al.
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For the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioners herein, North American Fund Management Corporation, and sisters Berta Maria Bremond, Jeanette Bremond-Piquet as grantors, trustees and life beneficiaries of a revocable trust for ultimate beneficiaries Isabella Piquet, Nathalie Piquet, Nathalie Bertrand (married name of Nathalie Piquet), Armand Bertrand (husband of Nathalie Piquet-Bertrand), Jean Jardel and Jacques Jardel pray this Court that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The decisions of both the U.S. District Court for the District of Columbia and the U.S. Court of Appeals for the District of Columbia Circuit were reported as set forth below:

1. *North American Fund Management Corporation, et al. v. Federal Deposit Insurance Corporation*, 785 F.Supp. 176 (D.D.C. 1992).

2. *North American Fund Management Corporation d/b/a Noramtrust U.S.A., et al. v. Federal Deposit Insurance Corporation*, 991 F.2d 873 (D.C. Cir. 1993).

STATEMENT OF JURISDICTION

This Court has jurisdiction to review the judgment of the U.S. Court of Appeals for the District of Columbia Circuit by Writ of Certiorari pursuant to 28 U.S.C.A. 1254(1). The judgment of the court of appeals was entered on May 7, 1993.

STATUTORY PROVISIONS AND REGULATIONS INVOLVED

12 U.S.C.A. § 1728 (1934),
as amended by Pub. L. No. 96-221 (1980).

12 U.S.C.A. § 1437 (1932) (repealed 1989).

12 C.F.R. Part 564 (1987).

INTRODUCTION

In 1980, the United States Congress increased the amount of federal deposit insurance available to persons with accounts in FSLIC and FDIC insured institutions from $40,000 to $100,000. 12 U.S.C.A. § 1728(a) (1934), *as amended by* Pub. L. No. 96-221 (1980). This was at a time when it seemed to most people, including Congress, that the price of oil would continue to increase *ad infinitum*. Shortly thereafter, the price of oil dropped dramatically, thereby precipitating the collapse of the economy in the several states comprising the geographical jurisdiction of the U.S. Court of Appeals for the Fifth Circuit.

Almost overnight, real estate which had been managed on a break-even basis, at worst, had become unprofitable. So many business associations became unprofitable simultaneously that savings and loan associations and banks all over the country were declared insolvent. As a consequence of the loans in default, banks and savings and loans all over the country were taken into receivership or liquidated by the FSLIC and FDIC.

Among these institutions was Vernon Savings and Loan of Vernon, Texas ("Vernon S and L"), from which Petitioners had purchased a series of 91 or 92 day certificates of deposit. Petitioners' initial investments were made at a time when United States lending institutions were attempting to attract foreign capital by offering very favorable interest rates. One of the primary inducements for such investments was the legally authorized imprimatur that these institutions were FSLIC or FDIC "insured." 12 C.F.R. § 563.28 (1987). Ultimately, the FSLIC was absorbed by the FDIC pursuant to an act of Congress.[1]

Petitioner Berta Maria Bremond invested money in a revocable trust account with Noramtrust in 1978. She opened an account by executing a Signature Card and Trust Agreement whose terms had been drafted for Noramtrust by an attorney. In 1985, she instructed Noramtrust to make her sister, Petitioner Jeanette Bremond-Piquet, a Co-Grantor, Trustee, and Life Beneficiary of the revocable trust account. Because Berta Maria Bremond had made her sister a Co-Grantor and Trustee, Bremond-Piquet at that point became empowered to remove all of the funds on her authority alone. After Vernon S and L collapsed in 1987, the sisters submitted an insurance claim for $188,701.73, the full value of their CD at Vernon S and L. FSLIC refused to pay more than $100,000.00 insurance claiming that Bremond-Piquet was not an "owner" within the meaning of Title 12 C.F.R. § 564.4(a). Bremond and Bremond-Piquet were thereby

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1/ The functions of FSLIC were assumed by the FDIC pursuant to Pub. L. No. 101-73, Title IV 401, 402 (August 9, 1989) *see* note set forth at 12 U.S.C.A. 1437 wherein 401 through 406 are reprinted in their entirety. Copies of 1728 and 1437 were reproduced and included in the Statutory Addendum to the Initial Brief of Appellants. A copy of said Initial Brief has been lodged with the Clerk of this Court.

damaged in the amount of $88,701.73 because FSLIC refused to acknowledge Bremond-Piquet's ownership. Both sisters were entitled to $100,000.00 deposit insurance coverage because both were "owners" within the definition of 12 C.F.R. Part 564 (1987). It is from this unfortunate confluence of events that the instant Petition arises.

STATEMENT OF THE CASE

(a) Statement of the Facts

North American Fund Management Corporation was organized under the laws of Panama and maintains its principal place of business in London, England. Noramtrust, U.S.A. ("Noramtrust") is a fiduciary service provided to the corporation's clients whereby they place money in U.S. investments such as certificates of deposit ("CD"). The corporation and Noramtrust are managed by a non-resident U.S. citizen, A. Richard Finchell, who has lived in England for over twenty years.

Noramtrust contracts with U.S. banks to act as "custodians" for the money invested by its clients. These "custodian" banks transmit funds and instructions to other U.S. banks and savings and loans where Noramtrust's clients have chosen to invest their money. Noramtrust used four different custodian banks between 1978 and November 1982. Each time Noramtrust moved its funds to a different bank, a new account was opened for its customers. The last time Noramtrust changed custodian banks relevant to the instant case was on August 1, 1987, twenty days before the purchase of the Bremond sisters' ill-fated CD. Noramtrust charges its clients fees for ensuring that the custodian banks properly

administer transactions and account for the funds placed with them.

In 1978, Berta Maria Bremond, a French citizen, and non-resident of the United States, directed Noramtrust to open a revocable trust account.[2] Jt. App. at 154-55. She named Raymond Leger, her sister, Jeanette Bremond-Piquet (also a French citizen and non-resident of the United States), and two nieces, Isabella and Nathalie Piquet as ultimate beneficiaries. The custodian bank at this time was First Pennsylvania Bank N.A. of Philadelphia, Pennsylvania. In another 1981 document which was not physically available for inclusion in the record below and, therefore, the Joint Appendix, Bremond subsequently made Leger a Co-Trustee.

On April 29, 1985, Miss Bremond instructed Noramtrust to remove Mr. Leger's name from the account as a Co-Trustee and Beneficiary and to name her sister as a Co-*Grantor*, *Trustee*, and *Life Beneficiary*. Jt. App. at 156-57. At this point, by the terms of gift contained in the Signature Card and Trust Agreement used *at that time* by Noramtrust, Jeanette Bremond-Piquet also became a 100% owner of all the funds in the account. She also became empowered to revoke the trust and to withdraw all of the funds using her signature only.

The sisters first purchased a certificate of deposit from Vernon S and L on May 23, 1985, three weeks after Miss Bremond instructed Noramtrust to make her sister a grantor, trustee, and life beneficiary as well as herself. Because the CDs had been documented as requested by New

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2/ Joint Appendix at 154. All references to the Joint Appendix of the parties in the Court of Appeals shall hereinafter be referenced as "Jt. App. at ____." A copy of the Joint Appendix has been lodged with the Clerk of this Court.

Jersey National Bank and Noramtrust, the records of Vernon S and L clearly showed that both sisters were owners from the outset of their transactions with that institution in certificates of deposit. Jt. App. at 163-75. Noramtrust has in its records a Signature Card and Trust Agreement dated July 12, 1985, when the custodian bank was Bank America Trust and Banking Corporation (Bahamas) Limited, a subsidiary of Bank America of New York. Jt. App. at 157-58.

On August 1, 1987, pursuant to a written agreement, New Jersey National Bank of Pennington, New Jersey ("New Jersey National Bank"), became the custodian bank for Noramtrust. The sisters executed a signature card as Grantors, Trustees, and Life Beneficiaries listing Bremond-Piquet's children as ultimate beneficiaries on September 4, 1987. Jt. App. at 161-62. The last CD of the series purchased by the sisters from Vernon Savings and Loan of Vernon, Texas was purchased on August 21, 1987 and due to mature on November 21, 1987. On November 19, 1987, Vernon Savings and Loan passed into receivership of the FSLIC, giving rise to this action.

(b) Statement of the Proceedings

After Vernon S and L was taken over by FSLIC as receiver in November 1987, Noramtrust's custodian bank, New Jersey National Bank, submitted claims for deposit insurance on two different occasions. The forms known as "Declarations for Testamentary Account (Multiple Trustee) were dated March 6 and November 1, 1988, respectively. Jt. App. at 174-77.

On the first form, Berta Maria Bremond was listed as the 100% contributor of the funds. On the second form *both* sisters were shown as having contributed 100% of the funds.

Consistent with the forms, Petitioners have asserted throughout these proceedings that, although Bremond placed the initial deposit in the first account, Bremond made her sister a 100% owner of the funds with full power of revocation of the trust three weeks *before* the funds were invested in the first CD purchased from Vernon S and L in May 1985. Noramtrust had contended, therefore, that Bremond-Piquet had *also* contributed 100% of the funds used to purchase the CDs from Vernon S and L.

On April 3, 1989, Andrew Pantos, an outside attorney on contract to FSLIC, sent Susan Lill of New Jersey National Bank, a letter denying coverage for amounts in excess of $100,000.00 of the $188,701.73 account. Petitioners disagreed with the refusal by FSLIC to insure the full $188,701.73 claiming that a further $88,701.73 was due and owing. Jt. App. at 178-80. Several requests for reconsideration were forwarded to FDIC by Petitioner Noramtrust, by Noramtrust's counsel for the first administrative reconsideration, and by current counsel for Petitioners. Jt. App. at 181-98. Current counsel received a letter on June 10, 1991, from Roger Hood, Assistant General Counsel to FDIC, to the effect that Petitioners' arguments were unpersuasive. Jt. App. at 199-201 Hood further advised counsel that the requests for reconsideration had not tolled the three year statute of limitations and that any cause of action would lapse on September 18, 1991.

Petitioners filed a Complaint for Enforcement of Insurance Coverage and for Declaratory Judgment in the U.S. District Court for the District of Columbia on September 6, 1991 On January 10, 1992, Judge Gerhard A. Gesell filed a Memorandum Opinion granting judgment for FDIC on a Motion to Dismiss *or*, in the Alternative for Summary Judgment. 785 F.Supp. 176 (D.D.C. 1992), App. at

A-17.[3] Judge Geseli reviewed the decisions of FSLIC and FDIC using the arbitrary and capricious standard of review. He found that FSLIC's reliance upon only the first submission of Declaration of Testamentary Trust (March 6, 1988) was reasonable. App. at A-16.

Petitioners filed a Notice of Appeal with the U.S. Court of Appeals for the District of Columbia Circuit on February 7, 1992. Oral Argument was heard by the court on March 25, 1993. The court issued its decision affirming the judgment of the district court on May 7, 1993. 991 F.2d 873 (D.C. Cir. 1993), App. at A-1.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

I. THE COURT OF APPEALS ERRED BY RELYING UPON FSLIC AND FDIC DEPOSIT INSURANCE COVERAGE DETERMINATIONS AND INTERPRETATIONS FOR A DEFINITION OF "OWNER" WHICH CONTRADICTED THE PLAIN MEANING OF "OWNER" AS SET FORTH IN THE ENABLING STATUTES AND LEGISLATIVE REGULATIONS.

A. The Holding of the Court of Appeals Is In Conflict With Applicable Decisions of This Court As To the Deference Which Should Be Given to the Plain Meaning of Enabling Statutes and Legislative Regulations

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3/ All references to the Appendix to this Petition shall hereinafter be referenced as "App. at ___."

In its opinion, the court of appeals concluded that FDIC's interpretation of 12 C.F.R. § 564.4 was reasonable "despite the inconsistencies in the regulations." App. at A-10. Petitioners respectfully submit that the court of appeals erred by so finding. The "inconsistencies" to which the court referred were actually between FSLIC interpretations as embodied in its determinations and the legislative regulations set forth at 12 C.F.R. Part 564 (1987).[4] The legislative regulations in the C.F.R. were promulgated pursuant to 12 U.S.C.A. § 1728, among others, and if the interpretations conflicted with properly drafted legislative regulations, they were, therefore, in contradiction to 12 U.S.C.A. § 1728, as well. FSLIC's actions taken in reliance upon said determinations and interpretations thereby constitute a usurpation of congressional authority by FSLIC and its successor FDIC.

1. FSLIC's Interpretation of "Owner" Contradicted the Meaning of "Owner" as Set Forth in the C.F.R.

Indeed, Petitioners have asserted from the outset of this action that FSLIC's determination of deposit insurance coverage constituted an interpretation that was in contradiction to the plain meaning of the statute and regulations promulgated pursuant thereto. The statute providing for coverage of the deposit in question here, 12 U.S.C.A. § 1728(a), used the terms "member or investor" to specify those covered by the deposit insurance program.

4/ A copy of 12 C.F.R. Part 564 (1987) and the Appendix thereto was reproduced and included in the Statutory Addendum to the Initial Brief of Appellants. A copy of the Initial Brief has been lodged with the Clerk of this Court as stated in note 1, *supra*.

Title 12 C.F.R. Part 564 referred to "owner" at § 564.1(c) "Settlement of insurance upon default -- Multiple Accounts," and at § 564.2(b)(3) "General principles applicable in determining insurance of accounts -- Records" to refer to those covered by the deposit insurance program. FSLIC's introduction of different words to describe the same participants in the insurance program caused an element of ambiguity from the outset.

In fact, Petitioners urge the FSLIC (FDIC) and the courts to read §§ 546.9 and 564.4 in *pari materia* to harmonize the operation of these regulations on the complicated insurance issues. Petitioners asserted that § 564.9(a) "Joint Accounts -- Separate Insurance Coverage" should have been the section controlling the determination of their claim for deposit insurance coverage:

> (a) *Separate insurance coverage.* Accounts owned jointly, whether as joint tenants with right of survivorship, as tenants by the entireties, as tenants in common, or by husband and wife as community property, shall be insured separately from accounts individually owned by the co-owners.

12 C.F.R. 564.9(a).

Of singular importance throughout the instant case has been 12 C.F.R. § 564.4 "Testamentary Accounts."[5] Both

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5/ 12 C.F.R. Part 564 (1987) "Settlement of Insurance" was in effect at the time that the FSLIC took Vernon S and L into receivership on November 19, 1987. Petitioners purchased the last CD from Vernon S and L in August 1987. Part 564 was subsequently recodified as Part 386. Part 386 was also included in the Statutory Addendum referenced at notes 1 and 4, *supra*.

the district court and the court of appeals stated that § 564.4 "Testamentary Accounts" was the applicable portion of the C.F.R. Assuming, *arguendo*, that the lower courts were correct as to its applicability, both courts erred by adopting and accepting FSLIC's interpretation of § 564.4. Title 12 C.F.R. § 564.4 is set forth below:

> (a) *Funds owned by an individual and invested in a revocable trust account*, tentative or "Totten" trust account, payable-on-death account or similar account evidencing an intention that on his death the funds shall belong to his spouse, child or grandchild, shall be insured up to $100,000 in the aggregate as to each such named beneficiary, separately from any other accounts of the owner.
>
> (b) If the named beneficiary of such an account is other than the owner's spouse, child or grandchild, the funds in such account shall be added to any individual accounts of such owner and insured up to $100,000 in the aggregate.

12 C.F.R. § 564.4 (emphasis added).

The District of Columbia Circuit, at the recommendation of FDIC, focused its attention on the words: "funds *owned* by an individual and *invested* in a revocable trust account." App. at A-4. The court accepted the FDIC's assertion that § 564.4(a) refers "reasonably enough" to "a person who initially *owns funds* and then *invests* them." App. at A-6. As authority for the viability of this interpretation the court cited the FSLIC letters of

determination which were attached to the Declaration of Richard Bogue in support of FDIC's Motion to Dismiss or, in the Alternative for Summary Judgment in the district court. App. at A-6. In doing so, FSLIC and FDIC have for all intents and purposes completely frustrated the use of such common devices as revocable trusts to provide for the orderly disposition of property.

Petitioners have consistently asserted that the proper interpretation of "owner" was contained in the C.F.R. as promulgated and set forth in Appendix B to 564 "Testamentary Accounts":

> In the case of a revocable trust account, the person who holds the power of revocation is deemed to be the owner of the funds in the account.

12 C.F.R. app. § 564.4, App. at A-9.

2. The Court Erred by Adopting a Definition of "Owner" Not Set Forth in the C.F.R.

The court need not have looked beyond the C.F.R. and by so doing erred. The court observed, correctly, that both Berta Maria Bremond and Jeanette Bremond-Piquet held the power of revocation and that FDIC did not dispute this fact. However, FDIC argued that Bremond-Piquet was not a "true owner" despite her acknowledged power of revocation. FDIC dismissed the language of gift contained in the Signature Card and Trust Agreement as "boilerplate." The court accepted FDIC's reasoning by stating that although Bremond-Piquet did own the funds, she did not

have a quantum of ownership sufficient for the purposes of federal deposit insurance coverage. To wit, the court stated:

> The only disputed "ownership" here is a purely federal concept-namely whether anything happened that was adequate to create in Bremond-Piquet the type of interest required by 564.4(a).

App. at A-10.

It was at this point in its reasoning that the court of appeals departed from the applicable decisions of this Court. By framing the issue in accordance with FDIC's concept of disjunctive ownership as interpreted in the FSLIC determinations, the court strayed into murky waters. This is not the first instance of a court seeking to harmonize "inconsistencies" in an attempt to uphold a "reasonable" interpretation by an agency. By so doing, however, the court of appeals ran afoul of principles of law which predate the Administrative Procedure Act ("APA"). 5 U.S.C.A. §§ 551-559, 701-706.

This Court stated in *United States v. Larionoff*, 431 U.S. 864 (1977), "[F]or regulations, in order to be valid must be consistent with the statute under which they are promulgated." *Id.* at 873. *Larionoff*, in note 12, contained a pertinent quote from a pre-APA case, *Manhattan Gen. Equip. Co. v. Commissioner*, 297 U.S. 129 (1936). In *Manhattan Gen. Equip. Co.*, this Court enunciated the proper relationship between the administrative "branch" and the legislative branch which empowers it:

> The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law, for *no such power can be delegated by Congress, but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity*. And not only must a regulation, in order to be valid, be consistent with the statute, but it must be reasonable.

Id. at 134 (emphasis added) (citations omitted).

Petitioners contend that the FSLIC interpretations relied upon were not regulations. Therefore, they were not endowed with the power of law, but rather, were for all intents and purposes a *nullity*, and entitled to no deference as a consequence thereof. This Court has held that agency interpretations in conflict with the plain meaning of a statute "must fall." This Court stated:

> But of course, no deference is due to agency interpretations at odds with the plain language of the statute itself. Even contemporaneous and longstanding agency interpretations must fall to the extent they conflict with statutory language.

Public Employees Retirement System of Ohio v. Betts, 492 U.S. 158, 171 (1989).

3. No Deference Was Due FSLIC's Interpretation of "Owner"

Deference is not due an agency interpretation which is in mortal conflict with the statutory language. This Court, when formulating its decision in *Betts*, relied upon its prior holding in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

This Court further relied upon its decision in *Chevron* when it was called upon to rule upon a Custom Service regulation when it pronounced:

> "If the statute is clear and unambiguous 'that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.' ... *The traditional deference courts pay to agency interpretation is not to be applied to alter the clearly expressed intent of Congress*."

K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1988) (emphasis added).

Further authority for this proposition can be found in *NLRB v. United Food and Commercial Workers Union Local 23, AFL-CIO*, 484 U.S. 112 (1987).

In short, Petitioners contend, as they have since 1989, that FSLIC's interpretations of the applicable regulations are so inconsistent with the legislative regulations as promulgated by the FSLIC through the APA mandated rulemaking process that they constitute a nullity. Petitioners' Complaint arose from an improper interpretation of the C.F.R. by FSLIC, not from the C.F.R. itself or the underlying statute. The procedural flaws in the regulatory scheme as

implemented heretofore by FSLIC and FDIC make this a case most peculiarly and particularly appropriate for review by this Court.

II. THE COURT OF APPEALS ERRED BY RELYING UPON FSLIC'S MANUAL FOR AN INTERPRETATION OF "OWNER" WHICH CONTRADICTED THE PLAIN MEANING OF "OWNER" AS SET FORTH IN THE ENABLING STATUTES AND THE PROMULGATED LEGISLATIVE REGULATIONS IN 12 C.F.R. AND WHICH MANUAL ALSO CONTAINED A VAGUE PROCEDURAL REQUIREMENT FOR "EXTRINSIC EVIDENCE."

A. The Holding of the Court of Appeals Is In Conflict With Applicable Decisions of this Court as to the Deference Due Interpretations Based Upon a Procedurally Defective Manual.

1. The FSLIC Manual Provided Inadequate Provisions for Review of the Facts

In the proceeding below, FSLIC and subsequently, FDIC, relied upon an interpretation of "owner" contrary to the definition as set forth in 12 C.F.R. § 564.4, *i.e.*, the person with the power of revocation. Instead, they chose to anchor their definition to a paragraph in the Congressional Record. The remarks of Senator Robertson addressed potential exploitation of the insurance fund by the use of multiple party accounts -- the addition of more insured parties at the stroke of a pen. 112 Cong. Rec. 26472-73 (daily ed. Oct. 13, 1966).

This Court spoke to the issue of such reliance upon the remarks of a single legislator when it stated, "The remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history." *Chrysler v. Brown*, 441 U.S. 281, 311 (1979).

The legislation, as addressed by Senator Robertson's remarks, was devoted almost exclusively to increasing the accountability of bank officers and directors. Accountability was evidently as much of an issue in 1966 as it was in 1987. FSLIC should have performed its savings and loan examinations with the same vitality and cynicism it devoted to its scrutiny of Petitioners' claim for insurance.

The FSLIC contract attorney who made the initial determination as to coverage in the instant case relied upon the *FSLIC Manual for Insurance Determinations* (1989) ("*FSLIC Manual*" or "*Manual*") in his Letter of Determination to Susan Lill of New Jersey National Bank written April 3, 1989. Regrettably, this "cookbook" approach, however expedient in the wake of the Texas banking disaster, worked a great disservice and hardship upon Petitioners herein. In truth, the facts were never properly examined as a consequence of the readily available and *inapposite* formulae contained in the *FSLIC Manual for Insurance Determinations*, which was dated August 1, 1989, *almost two years after the occurrence of loss in 1987*, and, therefore, not contemporaneous.

FSLIC's interpretation of "owner" as only the initial "contributor" apparently gained its currency at FSLIC by FSLIC's reliance upon the Uniform Probate Code as adopted by the various states. The consequences of resorting to such an interpretation are disparate results, to say the least. Petitioners' revocable trust was governed by the trust laws of New Jersey and was, in effect, looted by FSLIC's

reliance upon the Uniform Probate Code of Texas. The Texas Uniform Probate Code, as adopted, was in conflict with the Probate Code of New Jersey. The C.F.R. does not contain the terms "contribute" or "contributor." The C.F.R. does, however, contain numerous references to "owner" or "investor."

Petitioners have asserted repeatedly and consistently that the *FSLIC Manual* relied upon by FSLIC, FDIC and the courts in the instant case is flawed. The *Manual* is flawed because of its reliance upon interpretations set forth in prior FSLIC Determinations. The circular logic employed by FSLIC in relying upon its own Determinations is self-serving. FSLIC, as both a receiver and a creditor, was in a conflict of interest position with depositors who were also creditors. FSLIC, by definition, was not a disinterested party when it rendered determinations as to deposit insurance coverage. Furthermore, at the earliest phases of this action, the procedure set forth in the *Manual* itself was flawed because little, if any, heed was given to the complex factual nature of this or other matters.

2. The FSLIC Manual Was Procedurally Defective

Even assuming, *arguendo*, that the FSLIC's reliance upon the *Manual* was proper, the guidance contained therein was procedurally defective, because the *Manual* did not provide for definitions, criteria, or a proper mechanism for the review of the facts. The *Manual* set forth a provision at page 25 whereby claimants could provide extrinsic evidence in support of a Second Declaration of Testamentary Trust as was done in this case. The *Manual* was *procedurally defective* because the form of, or criteria for, the extrinsic evidence required were never set forth in the *Manual*. In turn, the

criteria for acceptable extrinsic evidence were never communicated to Petitioners or those in a similar position. This game of "peek-a-boo" or bureaucratic "keep away" properly belongs in "Alice in Wonderland." Petitioners, like Alice, have waited in vain for the reappearance of the elusive Cheshire Cat. Only here, Petitioners have never received a definition of acceptable extrinsic evidence from FSLIC.

By endorsing FDIC's reliance upon the flawed FSLIC interpretations embodied in the letters of determination and the *Manual*, the court of appeals placed itself in conflict with prior holdings of this Court as to the proper weight to be given to manuals and administrative interpretations made in reliance on them. This Court considered a *Bureau of Indian Affairs* manual and the procedures set forth therein in *Morton v. Ruiz*, 415 U.S. 199 (1974). This Court stated:

> This agency power to make rules that affect substantial individual rights and obligations carries with it the responsibility not only to remain consistent with the governing legislation, ... but also to employ procedures that conform to the law.... *No matter how rational or consistent with congressional intent a particular decision might be, the determination of eligibility cannot be made on an ad hoc basis by the dispenser of the funds.*

Id. at 232 (emphasis added).

The procedural portions of the *FSLIC Manual* virtually guaranteed that the determinations would be made on an *ad hoc* basis. This Court, when deciding *Morton v. Ruiz*, relied upon *Skidmore v. Swift*, 323 U.S. 134 (1944), one of the pre-APA Federal Communications Commission cases.

Among others were *Columbia Broadcasting System v. United States*, 316 U.S. 407 (1942) and *FCC Pottsville Broadcasting Co.*, 309 U.S. 134 (1940). This Court in *Morton* relied upon the *Skidmore* decision as to administrative interpretations:

> We have recognized previously that the weight of an administrative interpretation will depend, among other things, upon "its consistency with earlier and later pronouncements" of an agency. In this instance the BIA's somewhat inconsistent posture belies its present assertion. *In order for an agency interpretation to be granted deference, it must be consistent with the congressional purpose.*

Id. at 237 (emphasis added) (citations omitted).

Petitioners submit that the only consistency in the FSLIC letters of determination was that the determinations were consistently in favor of the FSLIC. The rationale for denying coverage varied from one case to the next. Petitioners were confronted with a situation whereby no matter what quantum of extrinsic evidence was offered, it was deemed insufficient by FSLIC. It was a game that only FSLIC could win.

3. The Extrinsic Evidence Requirements Were Never Defined in the FSLIC Manual

The district court and the court of appeals glossed over FSLIC's failure to define its procedure as to extrinsic evidence while duly quoting the FSLIC's contention that Petitioners supplied no extrinsic evidence. This is logically defective, or, in the alternative, a lamentable and tragic

oversight. The Petitioners proffered the signature cards and trust agreements, documents of a kind which would customarily be considered adequate for the purpose of banking transactions. Because Petitioners were *never* told what would satisfy FSLIC or its successor FDIC, they could not comply with what amounted to FSLIC's "secret law." The *Manual* was therefore in contradiction to the enabling statutes and the legislative regulations promulgated pursuant thereto.

In *Chrysler v. Brown*, 441 U.S. 281 (1979), this Court stressed the necessity of procedural "fairness" when it stated:

> For agency discretion is limited not only by substantive, statutory grants of authority, but also by the procedural requirements which "assure fairness and mature consideration of rules of general application." ... *The pertinent procedural limitations in this case are those found in the APA.*

Id. at 302 (emphasis added).

By accepting FDIC's position in the instant case as controlling, the court of appeals was at variance with this Court's holding as to the guidelines as expressed in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1977). There, this Court relied upon its holding in *Skidmore* when it stated:

> The most comprehensive statement of the role of interpretative rulings such as the EEOC guidelines is found in *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S.Ct. 161, 164, 89 L.Ed. 124 (1944), where the Court said:

> "... *The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning*, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."

Id. at 141-42 (emphasis added) (quoting *Skidmore*, 323 U.S. at 140).

Petitioners assert that FSLIC's determination in the instant case was not based upon thorough consideration of the facts and that its reasoning was invalid on its face. For these reasons and those stated *supra*, the holding of the court of appeals is in conflict with holdings of this Court.

B. The Holding of the Court of Appeals is in Conflict with Holdings By the Circuit Courts of Appeals for the Fifth, Eighth, Ninth and Eleventh Circuits as to the Deference Due Agency Manuals and Interpretations Which Contradict the Plain Meaning of the C.F.R. and its Underlying Statutes.

The holding of the court of appeals was in conflict with a holding by the Fifth Circuit in *United States Dept. of Labor v. Kast Metals Corp.*, 744 F.2d 1145 (5th Cir. 1984). FSLIC and its successor FDIC have in the past used the term "regulations" to encompass the C.F.R., the *FSLIC Manual* and their administrative interpretations. Petitioners contend that the *Manual* and the interpretive actions of FSLIC were not entitled to the same deference owed to the plain

language of the C.F.R. The Fifth Circuit stated in *Kast Metals*:

> Although the courts must recognize broad administrative discretion whether to implement procedures above the *minima* required by Congress, ... *an agency cannot outflank either the strictures of its enabling legislation or the APA's rulemaking framework by definitional fiat.*

Id. at 1149 (emphasis added).

1. The FSLIC Manual Contained Procedures Which Should Have Been Submitted to the APA Rulemaking Process

Had FSLIC and FDIC submitted the *Manual* and the interpretations in the letters of determination to the APA rulemaking process, Petitioners would have had notice of FSLIC procedure. The extrinsic evidence requirement should have been set forth explicitly, rather than in the vague and elusive manner that they were. The District of Columbia Circuit's holding in the instant case is in conflict with the holding of *Jean v. Nelson*, 711 F.2d 1455 (11th Cir. 1983). In *Jean*, the Eleventh Circuit pronounced its position as to the necessity for rulemaking when it said:

> In other words, the government contends it is doing nothing more than implementing the express language of the statute. *The government's argument, however, misses the mark*; the fact that an agency need not employ rulemaking in order to exercise its discretion on a case-by-case basis does not mean it cannot or has not resorted to a

> rule of general applicability which limits its discretionary function. *In the event there is resort to a rule, rulemaking is required*. 5 U.S.C.A. § 553.

Id. at 1476 (emphasis added).

The FDIC submitted only a few pages of its predecessor FSLIC's *Manual* for consideration by the district court. Petitioners were never given the opportunity to see the entire *Manual*. If the procedure for determining deposit insurance claims was set forth therein, then it should have been available in such a manner as to give claimants proper notice. The *Manual* and said procedures were not available, and should not have been given great weight by the court of appeals.

The District of Columbia Circuit is in conflict with the Ninth Circuit as well. The *Manual* and the interpretations it was supposed to embody went further than mere interpretations or statements of policy. As set forth *supra* they were actually *legislative rules*. They were legislative rules because they were rules "affecting individual rights and obligations." In *Cubanski v. Heckler*, 781 F.2d 1421 (9th Cir. 1986), the Ninth Circuit relied upon this Court's test for rules having the force of law as expressed in the *Chrysler* opinion:

> First, it must prescribe "substantive" or "legislative" rather than "interpretive" rules.... Second, its promulgation "must conform with any procedural requirements imposed by Congress."

Id. at 1425-26 (quoting *Chrysler Corp. v. Brown*, 441 U.S. 281, 301-03 (1979) (citations omitted).

The Ninth Circuit further stated:

> *The label that an agency chooses to describe its action is "only indicative and not dispositive, of* the agency's intent," which may be inferred from the *foreseeable effect* that the rule will have.

Id. at 1426 (emphasis added) (quoting *Louisiana Pacific Corp. v. Block*, 694 F.2d 1205, 1210 (9th Cir. 1982).

Further authority for Petitioners' contention that the District of Columbia Circuit's holding is in conflict with the Ninth Circuit is the holding in *Mada-Luna v. Fitzpatrick*, 813 F.2d 1006 (9th Cir. 1987). Petitioners respectfully submit that FSLIC, FDIC and the District of Columbia Circuit have treated the *Manual* and FSLIC letters of determination as if they were *binding norms*. If they were intended to be binding norms, then they should have been promulgated pursuant to the APA rulemaking process. The Ninth Circuit stated in *Mada-Luna*:

> In contrast, to the extent that the directive "narrowly limits administrative discretion" or establishes a "*binding norm*" that "so fills out the statutory scheme that upon application *one need only determine whether a given case is within the rule's criterion," it effectively replaces agency discretion with a new "binding rule of substantive law.*"

Id. at 1014 (emphasis added) (quoting *Ryder Truck Lines, Inc. v. United States*, 716 F.2d 1369, 1377 (11th Cir. 1983)).

The holding of the District of Columbia Circuit is in conflict, as well, with holdings of the Eighth Circuit. In *Oglala Sioux Tribe of Indians v. Andrus*, 603 F.2d 707 (8th

Cir. 1979), the Eighth Circuit relied upon this Court's holdings when it stated:

> *A court need not accept an agency's interpretation of its own regulations if that interpretation* is inconsistent with the statute under which the regulations were promulgated, is plainly inconsistent with the wording of the regulation, or otherwise *deprives affected parties of fair notice of the agency's intentions. See United States v. Larionoff, supra*, 431 U.S. at 872-873, 97 S.Ct. 2150; *Udall v. Tallman, supra*, 380 U.S. at 16-17, 85 S.Ct. 792; 4 K. Davis, *Administrative Law Treatise* § 30.12, at 260-261 (1958).

Id. at 718 (emphasis added).

2. FSLIC Did Not Give Petitioners Notice as to What Extrinsic Evidence Was Required of Them

As stated, *supra*, Petitioners had no notice as to what extrinsic evidence was required of them. If there had been a specific "trigger" for a proper claim in circumstances similar to Petitioners, then it should have been made clear. If FSLIC never had to announce what constituted proper extrinsic evidence, *then it could characterize any submission as inadequate*. Admittedly, this was probably a better practice from FDIC's perspective after the systemic banking failure in the Fifth Circuit. It was, however, more akin to shooting the family dog after a fox has killed the chickens. *FSLIC and FDIC failed to do their real job* under the Act whose legislative history they have cited -- enforce accountability on officers and directors before banking failures.

The Eighth Circuit further relied upon this Court's holding in *Morton v. Ruiz*, 415 U.S. 199 (1974), and its own holding in the *Oglala Sioux* case for authority in *Garreaux v. Andrus*, 676 F.2d 1206 (1982). In *Garreaux*, the Eighth Circuit stated that agency action without proper statutory authorization is invalid. The District of Columbia Circuit should similarly have disregarded FDIC's assertions. Further Eighth Circuit authority in conflict with the holding in the instant case is *Granville House, Inc. v. Department of Health and Human Services*, 715 F.2d 1292 (8th Cir. 1983). The *Granville* holding relied upon this Court's holdings in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), *United States v. Larionoff*, 431 U.S. 864 (1977) and *Skidmore v. Swift and Co.*, 323 U.S. 134 (1944).

Counsel for Petitioners stressed at oral argument that there was a series of bank accounts controlled by different terms and conditions opened by Noramtrust because Noramtrust had used a series of custodian banks in succession. Each time Noramtrust used a different bank, a new trust was created. Bremond-Piquet had been vested as a Co-Grantor, Trustee and Life Beneficiary before July 12, 1985, when the custodian bank was Bank America Trust and Banking Corporation (Bahamas) Limited. When Noramtrust contracted with New Jersey National Bank to be its custodian bank on August 1, 1987 as a matter of course, the *depositors and investors* in the new account were required to execute a *new* Signature Card and Trust Agreement, *which was executed by both sisters*.

Had FSLIC followed its own *Manual* and properly promulgated legislative regulations, it would have ruled favorably for Petitioners' full claim. Because she had already been given full control over the funds in 1985, Bremond-Piquet actually *did* contribute the funds and invest them in

1987 at the latest. Both Bremond and Bremond-Piquet were the owners of record of the CD in question here, and were so registered at Vernon S and L from the first purchase of a CD on May 23, 1985. Therefore, the documents of record at Vernon S and L should have been deemed *conclusive* as to the sisters' co-ownership of the funds.

> *The account records of the insured institution shall be conclusive* as to the existence of any relationship pursuant to which the funds in the account are invested and on which a claim for insurance coverage is founded. Examples would be trustee, agent, custodian or executor. No claim for insurance based on such a relationship will be recognized in the absence of its disclosure on such records.

12 C.F.R. § 564.2(b)(1) (emphasis added).

Finally, each CD was a discrete financial instrument contrary to the position that Petitioners engaged in a continuous transaction. It was continuous only in the respect that Petitioners reinvested in a series of discrete CDs from May 23, 1985 to November 19, 1987. Therefore, not only were there discrete trust accounts opened sequentially at a series of federally chartered banks, but there were sequentially, as well, several different CDs bearing different interest rates and different conditions such as the period of time for which the funds were committed. FSLIC's *Manual*, upon which FDIC has relied, was defective because it did not provide for a review of the facts and the interpretations in reliance thereupon "must fall." *Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158 (1989).

CONCLUSION

For the above-stated reasons, Noramtrust, U.S.A. and the other Petitioners respectfully request that this Court issue a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit on both questions presented.

Respectfully submitted,

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Dated: August 3, 1993

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

NORTH AMERICAN FUND MANAGEMENT CORPORATION
D/B/A NORAMTRUST U.S.A., ET AL.

APPELLANTS

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

APPELLEE.

No. 92-5039
991 F.2d 873
Argued March 25, 1993
Decided May 7, 1993

OPINION

PRIOR HISTORY: Appeal from the United States District Court for the District of Columbia. 91cv02271

COUNSEL: Andrew T. Canfield, with whom Edward F. Canfield was on the brief, for appellants.

Thomas L. Holzman, Counsel, Federal Deposit Insurance Corporation, with whom Thomas A. Schulz, Assistant General Counsel, and Colleen B. Bombardier, Senior Counsel, Federal Deposit Insurance Corporation, were on the brief, for appellee.

JUDGES: Before: RUTH B. GINSBURG, WILLIAMS and RANDOLPH, Circuit Judges. Opinion for the Court filed by Circuit Judge WILLIAMS.

OPINION: Williams, Circuit Judge: The $100,000 limit on federal insurance of savings and loan accounts covers revocable trust accounts--accounts that a grantor typically sets up in his or her name for life, with a beneficiary to take at the grantor's death (so long as there has been no revocation in the meantime). In applying the $100,000 limit, the Federal Savings and Loan Insurance Corporation (which was succeeded in August 1989 by the Federal Deposit Insurance Corporation[1]) drew a distinction between accounts for the benefit of the spouse, children and grandchildren of the owner or grantor (allowing insurance of up to $100,000 for each *beneficiary's* interest) and accounts for the benefit of others (aggregating the account with the *owner*'s individual accounts and allowing insurance of $100,000 for the aggregate). 12 CFR § 564.4 (1989). In considering an account originated by plaintiff Berta Maria Bremond for six beneficiaries, of whom three were daughters of her sister, Jeannette Bremond-Piquet, the FDIC disregarded the later addition of Bremond-Piquet's name as grantor and life beneficiary of the account, and accordingly denied the account the favorable treatment for trusts in favor of the owner's children. Although the pertinent regulations are by no means crystal clear, we find their interpretation by the FDIC here reasonable and accordingly affirm the district court's judgment dismissing plaintiffs' action. 785 F.Supp. 176.

1/ *See* 12 U.S.C. § 1437 Note, § 1821a(a)(2). For simplicity's sake we will usually refer to either entity as the FDIC.

* * *

In 1978 Berta Maria Bremond deposited money in a revocable trust account with Noramtrust, a firm that with various affiliates operates a "fiduciary service" for European and other foreign investors and that invested such funds in U.S. savings and loan associations to take advantage of their high interest rates. In May 1985 Noramtrust invested the funds in a Certificate of Deposit from the now-defunct Vernon Savings and Loan Association of Vernon, Texas. Noramtrust thereafter rolled over the CD every three months until August 1987, when Vernon became insolvent and was placed in receivership by the FSLIC. The nominal value of the account was then $188,000.

In the meantime, evidently in July 1985,[2] Bremond added her sister, Jeannette Bremond-Piquet, to the account as a fellow grantor, trustee and life beneficiary. Of the trust's six beneficiaries to take at the death of the grantor(s), three were daughters of Bremond-Piquet, but none was a spouse, child, or grandchild of Bremond. At least by November 1986, the periodic instructions between Noramtrust affiliates relating to rolling over the CD spoke of it as being registered for both sisters, in trust for the various younger beneficiaries.

The FDIC regulation on computation of the $100,000 limit for revocable trusts provides:

2/ Noramtrust "issued" a signature card to reflect the new ownership on July 12, 1985; a signed version dated September 4, 1987, evidently a copy of a later signature card, appears in the Joint Appendix. The difference in dates appears immaterial.

> (a) Funds *owned by an individual and invested* in a revocable trust account, . . . evidencing an intention that on his death the funds shall belong to his spouse, child, or grandchild, shall be insured up to $100,000 in the aggregate as to each such named beneficiary, separate from any other accounts of the owner.
>
> (b) If the named beneficiary of such an account is other than the owner's spouse, child or grandchild, the funds in such account shall be added to any individual accounts of such owner and insured up to $100,000 in the aggregate.

12 CFR § 564.4 (1989) (emphasis added).

To see whether the requisite family relation exists, the regulation clearly requires the agency to identify the "individual" who owned the funds and invested them in the account. As it has in other cases, the FDIC here interpreted the regulation to refer to the person who owned the funds when they were *initially* deposited into the trust account--in this case, Bremond--*unless* that person can produce extrinsic evidence that she intended to make a gift of all or part of the funds to the additionally named "grantor". *See* FDIC Letter of September 18, 1989 at 2. The most obvious example of such evidence would be a gift tax return of the supposed donor or an income tax return of the added grantor reflecting receipt of income from her life interest.

The two sisters offered no such evidence. They filled in and submitted, however, FDIC forms called "Declarations for Testamentary Account". The first, dated

March 6, 1988, said that Bremond alone had contributed 100% of the funds originally deposited in the account. The second, dated November 1, 1988, said that Bremond and Bremond-Piquet had each contributed 100% of the funds. The sisters provided evidence as to the successive roll-overs of the CD, and argued that they had thus established that the CD account at the time of Vernon's demise was not only jointly owned by them both as co-grantors but also that it had--in a sense--originated with them both. The FDIC, however, viewed the submissions as inadequate, saying that "while such evidence does support legal ownership of the funds by both trustees, it does not support the proposition that [Bremond-Piquet] owned any of the funds contributed to the Bremond trust." Though the sentence is garbled, in context there can be little doubt that the FDIC meant that Bremond-Piquet was not the owner of the funds before the initial establishment of the trust account and that there had been inadequate evidence of a genuine subsequent transfer from Bremond to Bremond-Piquet.

Noramtrust and the sisters filed an action in district court, challenging the FDIC's interpretation of § 564.4 to mean that the owner of funds for account insurance purposes is the original contributor of funds. Plaintiffs also contested the FDIC's requirement of extrinsic evidence of a consummated gift, arguing that Bremond's addition of Bremond-Piquet as a grantor of the trust, in combination with boilerplate language in the trust agreement characterizing the contribution of any trustee/life beneficiary as a gift to any other trustee/life beneficiary, should have been enough. The district court rejected these arguments and upheld the FDIC's actions.

* * *

As neither party contests Bremond's full ownership of the funds originally invested in the trust account, the only issue is the reasonableness of the FDIC's interpretation of § 564.4 (including its insistence on extrinsic evidence of a transfer). An agency's interpretation of its own regulation is entitled to deference "unless it is plainly erroneous or inconsistent with the regulation." *K.N. Energy, Inc. v. FERC,* 297 U.S. App. D.C. 13, 968 F.2d 1295, 1299 (D.C. Cir. 1992); *Lambert v. FDIC,* 847 F.2d 604, 606 (9th Cir. 1988). The agency's reading need not be the "most natural or the most logical," but only "reasonable and consistent with the regulation." *K.N. Energy*, 968 F.2d at 1299-1300 (citations and internal quotation marks omitted). The deference exceeds that owed an agency's interpretation of its own enabling statute, *id.* at 1300; the agency is the source of the regulations and also has the power to amend them.

As the FDIC points out, § 564.4(a) itself refers to "[f]unds *owned* by an individual and *invested* in a revocable trust account" (emphasis added). It argues, reasonably enough, that this refers to a person who initially *owns funds* and *then invests* them in the trust account , so that the identity of the "owner" under the regulation will normally be fixed at the time of the initial investment.

Indeed, the FDIC has consistently and repeatedly interpreted § 564.4 to equate the "owner" of a trust account with the original contributor, making an exception only when the parties produce extrinsic evidence of a gift. *See*, for example, Insurance Appeal No. 89-225-

5871 (Nov. 7, 1989, and Mar. 19, 1990); Insurance Appeal No. 87-155-6483 (Jan. 15, 1988); Insurance Appeal No. 87-078-8259 (July 13, 1987); Insurance Appeal No. 86-359, 1987 FHLBB LEXIS 231 (Mar. 24, 1987). In addition, the *FSLIC Manual for Insurance Determinations*, which was in effect at the time the FDIC decided this case and which sets forth procedures for implementing the regulations, provides that when a revocable trust account has more than one owner, the first step is to determine each owner's "interest" from the Declaration for Testamentary Account.

> If the trustees are family members, then the Declaration . . . is accepted without any documentation to support the trustees' ownership interests in the account. The one exception to this rule is when there is an account record or other evidence which is inconsistent with the ownership interests stated in the [Declaration]. For instance, occasionally the trustees ask to complete a second Declaration in order to change their previously stated ownership interests and thereby increase the insurance on the account. In this situation, the trustees will be allowed to complete a second Declaration; however, they must also provide *extrinsic evidence supporting their ownership interests* in the account.

Manual at 25; *see* Joint Appendix 72, 78 (emphasis added). The FDIC's inquiry in this case was thus consistent with established agency practice. Here, even if the sisters had filed only the second Declaration (naming both as co-owners), the inconsistency between that Declaration and the evidence as to the origin of the account would have triggered the FDIC's extrinsic evidence rule. In view of the

potential for expansion of FDIC coverage through manipulation of revocable trust accounts, and stated congressional concern over just such manipulation, *see, e.g.*, 112 Cong. Rec. 26472-73 (Oct. 13, 1966) (expressing concern with "the use of devices such as . . . revocable trust accounts to obtain insurance far in excess of the limits established by Congress") (statement of Sen. Robertson, member of the Conference Committee for the 1966 FSLIC legislation), the FDIC's reading seems entirely reasonable. So far so good.

Unfortunately the regulations contain some conflicting passages. First, plaintiffs argue since the account here was a joint one, it should be governed by the following statement on joint accounts:

> The interests of the co-owners of a joint account shall be deemed equal, unless otherwise stated on the insured institution's records in the case of a tenancy in common.

12 CFR § 564.2(b)(3) (1987). Under this, say the plaintiffs, the account should enjoy the benefit of the presumption in favor of equal interests of the co-owners. But the regulations elsewhere indicate that the FDIC considers "joint accounts" and "testamentary accounts" to be separate animals, subject to separate regulations. Compare 12 CFR § 564.4 (testamentary accounts) with 12 CFR § 564.9 (joint accounts); *see, e.g., United States League Federal Guide* ¶ 11,271 at 3448 (1987). So the nonapplication of this provision appears reasonable.

Even when we reach testamentary trusts there are problems. Plaintiffs point to Appendix B to 12 CFR § 564, entitled "Testamentary Accounts," which states that:

> In the case of a revocable trust account, the person who holds the power of revocation is deemed to be the owner of the funds in the account.

12 CFR § 564 App. B. The FDIC appears not to dispute that Bremond-Piquet held a power of revocation.

The FDIC argues that this passage is intended merely to distinguish the "true" owner, who must have the power of revocation, from someone acting purely as a trustee or fiduciary. Thus the power of revocation is a necessary condition of ownership, but not sufficient for purposes of § 564.4(a). In support of this reading, the FDIC points to the next sentence, which states that "[i]f a revocable trust account is held in the name of a fiduciary other than the owner of the funds, any other accounts held by the fiduciary are insured separately from such revocable trust account." 12 CFR § 564 App. B.

The FDIC also notes one of the five examples that follow this passage and are designed to provide guidance for interpretation of the regulations. Example 4 sets forth a hypothetical case in which a husband and wife each invest $200,000 in a revocable trust account for their son and daughter. The husband and wife are each described as the "owner of one half of the funds" in the account. *Id.* Unless the FDIC's premise about the centrality of original ownership were correct, the example would presumably refer to both spouses as "owners" rather than specifying the proportion of each one's ownership interest, which simply reflects their respective original contributions.

The appellants also assert that state law should control the question of ownership. A choice-of-law clause in the Signature Cards and Trust Agreements executed September 4, 1987, calls for use of New Jersey law, which if controlling would create a presumption that the two sisters owned the trust account in equal shares. N.J. Stat. Ann. § 17:16I-4.

We need not decide whether, if state law were relevant, it would be the law of New Jersey rather than that of Texas, the state in which the insured institute (Vernon) was located. *See* 12 C.F.R. § 564.2(a) ("Insofar as rules of local law enter into [insurance] determinations, the law of the jurisdiction in which the insured institution's principal office is located shall govern."). The only disputed "ownership" here is a purely federal concept--namely, whether anything happened that was adequate to create in Bremond-Piquet the type of interest required by § 564.4(a). This depended on federal requirements--including the presumption based on the original contribution and the requirement of extrinsic evidence to support assertions of post-origin transfer. *See* 12 U.S.C. § 1728(a) (1989) (granting the FDIC power to define terms in order to clarify the extent of insurance coverage). While state law might have been relevant to deciding whether Bremond really owned the funds in the initial transfer, *cf.* Insurance Appeal No. 89-225-5871 (Nov. 7, 1989), it was quite irrelevant here.

Finding the FDIC's interpretation of § 564.4 reasonable despite the inconsistencies in the regulations, we affirm the judgment of the district court.

So ordered.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

NORTH AMERICAN FUND MANAGEMENT CORPORATION, ET AL.,

Plaintiffs,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,

Defendant.

Civil Action No. 91-2271

785 F. Supp. 176

Decided January 10, 1992,

COUNSEL: Edward F. Canfield, Esquire, Washington, D.C., Counsel for Plaintiffs.

Thomas L. Holzman, Esquire, Washington, D.C., Counsel for Defendant.

JUDGE: Gerhard A. Gesell

MEMORANDUM

This matter is before the Court on defendant's Motion to Dismiss or, in the Alternative, for Summary Judgment, plaintiffs' opposition thereto, and defendant's reply. The briefs are supported by documents and declarations. There are no material facts in dispute. The Court has federal question and declaratory judgment jurisdiction.

Background

Plaintiff, North American Fund Management Corporation ("Noramtrust"), acting as fiduciary for two sisters, Berta Maria Bremond ("Bremond") and Jeannette Bremond-Piquet ("Bremond-Piquet"), purchased a Certificate of Deposit ("CD") in 1985 from Vernon Savings and Loan ("Vernon") of Vernon, Texas, with funds received pursuant to a revocable testamentary trust established by and on behalf of the two sisters as grantors and trustees for six named beneficiaries. The CD was rolled over every three months until 1987, when Vernon was placed in receivership because it became insolvent. Vernon was insured by the Federal Savings and Loan Insurance Corporation ("FSLIC").

In April 1989, FSLIC determined that only $100,000 of the account, which then amounted to $188,701.73, was insured. *See* Letter of Andrew J. Pantos to Susan Lill (April 3, 1989) (attached as Ex. D to Dec. of Richard Bogue). FSLIC made that determination after it had conducted a full inquiry into the facts and received, among other things, two sworn declarations. In the first declaration, dated March 6, 1988, both Bremond and Bremond-Piquet affirmed that Bremond had contributed 100 percent of the funds deposited in the testamentary trust account invested at Vernon. In the second declaration, executed eight months later on November 1, 1988, the sisters indicated that each of them had contributed 100 percent of the fund.

FSLIC, acting on the basis of the first declaration, concluded that, at the time of deposit, the funds were owned by Bremond alone, and that, therefore, because none of the trust beneficiaries was her spouse, child or

grandchild, only $100,000 was insured under the pertinent FSLIC regulation. *See* 12 C.F.R. § 564.4 (1989). That regulation provided in relevant part as follows:

> (a) Funds owned by the individual and invested in a revocable trust account, . . . evidencing an intention that on his death the funds shall belong to his spouse, child or grandchild, shall be insured up to $100,000 in the aggregate as to each such named beneficiary, separately from other accounts of the owners.
>
> (b) If the named beneficiary of such account is other than the owner's spouse, child or grandchild, the funds in such account shall be added to any individual accounts of such owner and insured up to $100,000 in the aggregate.

Thereafter, acting on a request for reconsideration, the Federal Deposit Insurance Corporation (" FDIC")[1] affirmed by final decision on September 18, 1989 (attached as Ex. F to Def. Memo.). Thus, the $88,701.73 in the account in excess of the $100,000 federal insurance limit remained uninsured. All named trustees and beneficiaries brought suit in this Court in a complaint filed September 6, 1991.

1/ The Financial Institutions Reform, Recovery and Enforcement Act of 1989, which abolished FSLIC, among other things, requires FDIC as the new manager of the FSLIC Resolution Fund to base its insurance determinations concerning existing accounts on FSLIC prior regulations and interpretations. *See* 12 U.S.C. § 1437 Note.

Standard of Review

Before turning to the merits, it is necessary to resolve a dispute between the parties as to the appropriate standard of review. Plaintiffs seek a trial de novo or an independent determination by the Court based on the full record. FDIC contends that the arbitrary-capricious standard of the Administrative Procedure Act controls.

In *Coit Independence Joint Venture v. Federal Savings and Loan Insurance Corporation,* 489 U.S. 561, 109 S.Ct. 1361, 103 L.Ed.2d 602 (1989), the Supreme Court held that FSLIC did not have authority to adjudicate state law claims brought against institutions for which FSLIC had been appointed receiver, and that, therefore, de novo review was appropriate in such cases. However, the decision did not resolve the issue presented by this case of FSLIC's authority over claims against it as insurer, rather than receiver. *Cf. Godwin v. FSLIC,* 806 F.2d 1290, 1291 n.1 (5th Cir. 1987) (distinguishing the two roles of FSLIC). Here the Court is reviewing the action of a federal agency dispensing federal benefits under a federal insurance plan established and operated according to federal statutes and regulations. Under these circumstances, the Court's authority is limited. FDIC's action may be set aside only if it is arbitrary, capricious, an abuse of discretion or contrary to law. *See* 5 U.S.C. § 706. The Court thus rejects plaintiffs reliance on Coit and follows the Fifth Circuit's analysis in *Hymel v. Federal Deposit Ins. Corp.,* 925 F.2d 881, 882-83 (5th Cir. 1991).

Merits

The FDIC acted reasonably and in full compliance with the governing statute and regulations in concluding that Bremond alone owned the funds deposited, as both sisters had stated in their first sworn declaration.

The later declaration, in which both sisters claimed to be owners, was rejected by FSLIC and by its successor, FDIC. Pursuant to its broad statutory authority to regulate federal insurance coverage -- in particular, to guard against attempts to evade the insurance limit of $100,000 -- *see* 12 U.S.C. § 1728 (1988); 112 Cong. Rec. 26472-73 (daily ed. Oct. 13, 1986) (remarks of Sen. Robertson), FSLIC promulgated regulations defining an owner of funds as the person who contributed those funds at the time of initial deposit. *See* 12 C.F.R. § 564.4. The sisters' first declaration asserted that Bremond alone was the initial contributor. FDIC rejected the assertion of the second declaration that both sisters were the initial contributors, at least in part because the sisters failed to supplement that assertion with any extrinsic evidence (such as a gift tax receipt), as is required by the *FSLIC Manual for Insurance Determinations* (Feb. 1, 1989). *See* Letter from Mary A. Creedon to Susan Lill (Sept. 18, 1989) (Exh. 14 to Pl. Opp. Memo.). FDIC found that neither the boilerplate language in the trust agreement that purported to characterize the contribution of one trustee as a gift to the other trustees -- language that is found in every such form trust account -- nor the action of the sisters in periodically rolling over the account, were sufficient to satisfy the requirement for extrinsic evidence.

The Court cannot find that FDIC's decision was arbitrary or capricious. Despite the boilerplate language

and the theoretical availabiiity of the funds to both sisters, there is no evidence in the record that there ever was a consummated gift from Bremond to Bremond-Piquet. Moreover, the mere fact that the sisters acted to roll over the account does not change the identity of the initial contributor. Plaintiffs have invoked various provisions of state law relating to the rights of trustees and owners of money, but all of those arguments are tangential to the central issue, which is governed by federal statutes and regulations that have developed without reference to the intricacies of conflicting state law.

In short, as FDIC notes, to allow Bremond to claim more than the $100,000 maximum on her revocable trust account simply by adding trustees' names would be contrary to the entire statutory scheme and contrary to the regulations. Moreover, because none of the beneficiaries was directly related to Bremond as specified by 12 C.F.R. § 564.4(a), she cannot claim additional insurance coverage under that section. Stated simply, there being no competent proof that Bremond-Piquet deposited any money in the account, the amount of coverage is limited to the $100,000 allowed by FDIC to Bremond.

Judgment shall be entered for FDIC. An appropriate Order is filed herewith.

No. 93-190

Supreme Court, U.S.
FILED
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CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1993

NORTH AMERICAN FUND MANAGEMENT CORPORATION D/B/A NORAMTRUST U.S.A., ET AL., PETITIONERS

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL DEPOSIT INSURANCE CORPORATION IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly upheld as reasonable the Federal Deposit Insurance Corporation's interpretation of the regulation (12 C.F.R. 564.4 (1987)) governing deposit insurance of revocable trust accounts.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A10) is reported at 991 F.2d 873. The opinion of the district court (Pet. App. A11-A16) is reported at 785 F. Supp. 176.

JURISDICTION

The judgment of the court of appeals was entered on May 7, 1993. The petition for a writ of certiorari was filed on August 4, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Prior to August 1989, federal law limited the amount of deposit insurance on accounts in federally insured savings and loans to $100,000 and delegated the authority to prescribe regulations that "define * * * the extent of the insurance coverage resulting" from the $100,000 limit to the Federal Savings and Loan Insurance Corporation (FSLIC). 12 U.S.C. 1728(a) (1988).[1] The FSLIC promulgated 12 C.F.R. 564.4 (1987) to address how the $100,000 limit on deposit insurance applied to revocable trust accounts —*i.e.*, "accounts that a grantor typically sets up in his or her name for life, with a beneficiary to take at the grantor's death." Pet. App. A2. As the court of appeals in this case explained, that regulation "drew a distinction between accounts for the benefit of the spouse, children and grandchildren of the owner or grantor (allowing insurance of up to $100,000 for each *beneficiary's* interest) and accounts for the benefit of others (aggregating the account with the *owner's* individual accounts and allowing insurance of $100,000

[1] On August 9, 1989, the FSLIC was abolished by the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, § 401(a)(1), 103 Stat. 354, and the Federal Deposit Insurance Corporation (FDIC) succeeded to the FSLIC's responsibilities as the insurer of deposits in failed savings and loans. Pet. App. A2 n.1; 12 U.S.C. 1437 note, 1821a(a)(2) (Supp. IV 1992). The FDIC was required to apply FSLIC regulations to deposit insurance claims arising out of failed savings and loans prior to promulgation of uniform regulations for deposit insurance of accounts in all financial institutions. FIRREA § 402(c)(1), 103 Stat. 358; 12 U.S.C. 1437 note (Supp. IV 1992).

for the aggregate)." *Ibid.* The regulation provided in relevant part:

> (a) Funds owned by an individual and invested in a revocable trust account * * * evidencing an intention that on his death the funds shall belong to his spouse, child or grandchild, shall be insured up to $100,000 in the aggregate as to each such named beneficiary, separately from any other accounts of the owner.
>
> (b) If the named beneficiary of such an account is other than the owner's spouse, child or grandchild, the funds in such account shall be added to any individual accounts of such owner and insured up to $100,000 in the aggregate.

12 C.F.R. 564.4 (1987).[2] As the court of appeals further explained, Section 564.4 "requires the agency to identify the 'individual' who owned the funds and invested them in the account" in order to "see whether the requisite family relation exists" to allow each beneficiary the benefit of the $100,000 limit on federal deposit insurance. Pet. App. A4.

2. In 1978, petitioner Berta Maria Bremond, a French citizen, deposited money in a revocable trust account with petitioner Noramtrust, which offered a "fiduciary service" to foreign investors who wished to invest in United States savings and loan institutions. Pet. App. A3, A6. In May 1985, Noramtrust invested the money in a certificate of deposit (CD) at Vernon

[2] The current version of the regulation, which appears at 12 C.F.R. 330.8, is substantially similar to the 1987 version in substance, but it is broader in terms of its applicability, as it covers all federally insured banking institutions, and not just federally insured thrifts.

Savings and Loan Association in Texas. *Id.* at A3. Thereafter, Noramtrust rolled over the CD every three months until August 1987, when Vernon became insolvent and was placed in receivership by the FSLIC. *Ibid.* At that time, the account contained approximately $188,000. *Ibid.*

Meanwhile, in July 1985, Bremond added her sister, petitioner Jeannette Bremond-Piquet, as a grantor, trustee, and life beneficiary of the revocable trust. Pet. App. A3. Standardized language in the trust document stated that any contribution to the trust by one grantor was a gift to all other grantors. *Id.* at A15. Nonetheless, the record does not reflect (nor do petitioners claim) that Bremond or Bremond-Piquet ever filed a gift tax return reflecting any gift of the funds in the account to Bremond-Piquet, or that Bremond-Piquet ever filed a tax return reflecting that she received any income from a life interest in the corpus of the trust. The trust had six beneficiaries. Three were daughters of Bremond-Piquet, but none was a spouse, child, or grandchild of Bremond. *Id.* at A3.

In April 1989, the FSLIC told petitioners (and in September 1989 the FDIC reaffirmed) that federal deposit insurance on the account was limited to $100,000. Pet. App. A12-A13. The FDIC determined that Bremond was the owner of the funds in the account and that she did not have the requisite family relationship with the beneficiaries to entitle each of them to the $100,000 limit prescribed in 12 C.F.R. 564.4(a) (1987); thus, the amount of deposit insurance was limited to $100,000 under 12 C.F.R. 564.4(b) (1987). Pet. App. A12-A13. That determination was based on the FDIC's longstanding view that Section 564.4

"refer[s] to the person who owned the funds when they were *initially* deposited into the trust account —in this case, Bremond—*unless* that person can produce extrinsic evidence that she intended to make a gift of all or part of the funds to the additionally named 'grantor'." Pet. App. A4.

The FDIC found that there was no extrinsic evidence of such a transfer. Pet. App. A5, A15. Indeed, Bremond and Bremond-Piquet had admitted in a written declaration to the FDIC that Bremond alone had contributed 100% of the funds deposited in the account. *Id.* at A12, A15. Based on that declaration, the FDIC rejected a later declaration in which the sisters claimed to be co-owners of the funds. *Id.* at A15. The FDIC also determined that neither the standardized language in the trust agreement that purported to characterize the contribution of each grantor as a gift to all other grantees nor the periodic rolling over of the Vernon CD sufficed to prove a genuine transfer. *Id.* at A5.

3. Petitioners brought this action in the United States District Court for the District of Columbia challenging the FDIC's interpretation of 12 C.F.R. 564.4 (1987). The district court granted the FDIC's motion to dismiss the action. Pet. App. A11-A16; see also *id.* at A2. The court held that "[t]he FDIC acted reasonably and in full compliance with the governing statute and regulations in concluding that Bremond alone owned the funds deposited" and in limiting the amount of deposit insurance on the account to $100,000. *Id.* at A15, A16.

4. The United States Court of Appeals for the District of Columbia Circuit affirmed, holding that the FDIC's interpretation of 12 C.F.R. 564.4 (1987)

was reasonable. Pet. App. A1-A10. The court observed that the agency's interpretation accorded with the text of the regulation:

> As the FDIC points out, § 564.4(a) itself refers to "[f]unds *owned* by an individual and *invested* in a revocable trust account" (emphasis added). It argues, reasonably enough, that this refers to a person who initially *owns funds* and *then invests* them in the trust account, so that the identity of the "owner" under the regulation will normally be fixed at the time of the initial investment.

Id. at A6. The court also observed that the FDIC had applied that interpretation "consistently and repeatedly." *Ibid.* The court concluded that the agency's longstanding interpretation was "entirely reasonable" in light of "the potential for expansion of FDIC coverage through manipulation of revocable trust accounts, and stated congressional concern over just such manipulation." *Id.* at A7-A8.

The court rejected petitioners' reliance on the FDIC regulation on joint accounts, which stated that "[t]he interests of the co-owners of a joint account shall be deemed equal." 12 C.F.R. 564.2(b)(3) (1987). The court noted that "the regulations elsewhere indicate that the FDIC considers 'joint accounts' and 'testamentary accounts' to be separate animals, subject to separate regulations." Pet. App. A8. The court accordingly held that the FDIC's "non-application" of the joint account regulation was "reasonable." *Ibid.*

The court also rejected petitioners' reliance on the fact that Bremond-Piquet had the power of revocation, and that a sentence in an appendix to the FDIC regulations stated that "the person who holds the

power of revocation is deemed to be the owner of the funds in the account." 12 C.F.R. Pt. 564, App. at 463 (1987). The court accepted the FDIC's explanation that this statement "[wa]s intended merely to distinguish the 'true' owner, who must have the power of revocation, from someone acting purely as a trustee or fiduciary." Pet. App. A9. The court observed that the FDIC's explanation was supported by the context in which the statement occurred. *Ibid.*

ARGUMENT

This case presents a single, narrow issue: whether the FDIC reasonably interprets 12 C.F.R. 564.4 (1987) —which calculates the amount of federal deposit insurance on revocable trust accounts by reference to the relationship between the beneficiaries of the trust and the owner of the funds in the account—to refer to the person who initially owned the funds and invested them in the account, in the absence of extrinsic evidence of a subsequent transfer of the funds. The court of appeals correctly held that the FDIC's interpretation is reasonable, and that holding does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. This Court's decisions make clear that an agency's interpretation of its own regulation is entitled to great deference. See, *e.g.*, *Stinson* v. *United States*, 113 S. Ct. 1913, 1919 (1993); *Udall* v. *Tallman*, 380 U.S. 1, 16-17 (1965). "[P]rovided an agency's interpretation of its own regulation does not violate the Constitution or a federal statute, it must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Stinson*, 113 S. Ct. at 1919 (internal quotation marks omitted). Peti-

tioners contend (Pet. 10-17) that the FDIC's interpretation of 12 C.F.R. 564.4 (1987) is inconsistent with the plain language of both the regulation itself and the statute that it implements. That contention is without merit.

Nothing in the language of the relevant statute forecloses the FDIC's interpretation. Section 1728(a) of Title 12 (now repealed) broadly provided that "no member or investor * * * of any [federally insured thrift] institution shall be insured for an aggregate amount in excess of $100,000." 12 U.S.C. 1728(a) (1988). Section 1728(a) did not, however, specify how the $100,000 limit on insurance applied to revocable trust accounts. Instead, Section 1728(a) authorized the FSLIC, "[f]or the purpose of clarifying and defining the insurance coverage under this subsection," to "define * * * the extent of the insurance coverage resulting [from the provision]." 12 U.S.C. 1728(a) (1988). Thus, the statute afforded the FSLIC exceedingly broad discretion in defining the operation of the $100,000 limit on insurance. See *Batterton* v. *Francis*, 432 U.S. 416, 424-426 (1977). Petitioners err in asserting that the FDIC's interpretation of a regulation adopted by the FSLIC in the exercise of its broad statutory discretion conflicts with the text of the statute.

Nor is there any conflict between the FDIC's interpretation of Section 564.4 and the text of that regulation. As the court of appeals correctly recognized, the language of the regulation supports the FDIC's interpretation. Section 564.4 requires the agency to identify the person who initially owns funds and then invests them in the revocable trust account. Thus, as the court of appeals stated, "the identity of the

'owner' under the regulation will normally be fixed at the time of the initial investment." Pet. App. A6. The FDIC's interpretation comports with the regulation by treating the contributor of the original funds as the owner of the account in the absence of evidence of a subsequent transfer.

Petitioners' challenge to the FDIC's interpretation of Section 564.4 is based, not on the regulation itself, but on the regulation governing joint accounts and on a sentence in the appendix to 12 C.F.R. Pt. 564 (1987). The regulation on joint accounts, however, is inapposite; as the court of appeals explained, joint accounts and revocable trust accounts are treated as "separate animals" under the FDIC's regulations. Pet. App. A8; accord *Goldin* v. *FDIC*, 985 F.2d 261, 264 (6th Cir. 1993). In any event, petitioners would have been entitled to only $100,000 of deposit insurance under the joint account regulation. See 12 C.F.R. 564.9(d) (1987) ("All joint accounts owned by the same combination of individuals shall first be added together and insured up to $100,000 in the aggregate."). Thus, petitioners' reliance on that regulation is misplaced.[3]

The sentence in the appendix to 12 C.F.R. Pt. 564 (1987) on which petitioners rely likewise provides no support for petitioners' position. That sentence, when read in context, merely indicates that the power

[3] Petitioners rely on subsection (a) of 12 C.F.R. 564.9 (1987) ("Joint accounts") to argue (Pet. 11) that Bremond and Bremond-Piquet were co-owners of the revocable trust account. Even if 12 C.F.R. 564.9 (1987) were applicable to revocable trust accounts—which it is not—the regulation would not support petitioners' position. Subsection (a) provides the legal requirements for separate insurance coverage of a joint account; it does not address how ownership of the funds in a joint account is to be determined.

of revocation is a necessary, but not a sufficient, condition of ownership. See Pet. App. A9.[4]

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[4] The appendix to 12 C.F.R. Pt. 564 (1987) is entitled "Examples of Insurance Coverage Afforded Accounts in Institutions Insured by the [FSLIC]." Section B of the appendix addresses "Testamentary Accounts." Petitioners rely on a sentence (which we have italicized) in the following paragraph, which introduces the examples set forth in Section B of the appendix:

> The term "testamentary account" refers to a revocable trust account, tentative or "Totten" trust account, "payable-on-death" account or any similar account which evidences an intention that the funds shall pass on the death of the owner of the funds to a named beneficiary. If the beneficiary is a spouse, child or grandchild of the owner, the funds in all such accounts are insured for the owner up to $100,000 in the aggregate as to each such beneficiary, separately from any other individual accounts of the owner. If the beneficiary of such an account is other than a spouse, child or grandchild of the owner, the funds in the account are, for insurance purposes, added to any other individual accounts of the owner and insured up [to] $100,000 in the aggregate. *In the case of a revocable trust account, the person who holds the power of revocation is deemed to be the owner of the funds in the account.* If a revocable trust account is held in the name of a fiduciary other than the owner of the funds, any other accounts held by the fiduciary are insured separately from such revocable trust account.

As the FDIC explained in the court of appeals, and the court accepted, the sentence on which petitioners rely "is intended merely to distinguish the 'true' owner, who must have the power of revocation, from someone acting purely as a trustee or fiduciary." Pet. App. A9. That explanation is confirmed by the next sentence in the paragraph, which provides that accounts owned by a fiduciary who lacks the power of revocation are not taken into account for insurance purposes. Further support is provided by one of the subsequent illustra-

2. Petitioners also contend (Pet. 17-29) that the FDIC erred in relying on the *FSLIC Manual for Insurance Determinations*. That contention does not withstand scrutiny.

Petitioners first argue (Pet. 21-22) that the FSLIC manual provides insufficient guidance on the extrinsic evidence needed to establish that a grantor has transferred funds in a revocable trust account to another grantor. Petitioners, however, provided no extrinsic evidence to support their claim that Bremond made a gift to Bremond-Piquet of the funds that she owned and invested in the revocable trust account. In fact, Bremond and Bremond-Piquet furnished evidence that no such transfer had occurred when, in 1988, they submitted to the FDIC a written declaration stating that Bremond owned 100% of the funds. Pet. App. A5. Finally, as the court of appeals observed, "[t]he most obvious example of such evidence would be a gift tax return of the supposed donor or an income tax return of the added grantor reflecting receipt of income from her life interest." *Id.* at A4. That petitioners were unable to supply such evidence results from their failure to effect a genuine transfer, and not from any inadequacy in the FSLIC manual.

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tive examples, which characterizes a husband and wife who have each contributed $200,000 to a revocable trust account as the "owner of one-half of the funds in the account." 12 C.F.R. Pt. 564, App. at 463 (1987) (example 4). As the court of appeals explained, "[u]nless the FDIC's premise about the centrality of original ownership were correct, the example would presumably refer to both spouses as 'owners' rather than specifying the proportion of each one's ownership interest, which simply reflects their respective original contributions." Pet. App. A9.

Petitioners also argue (Pet. 22) that, because the FSLIC manual was unpublished, they had inadequate notice of the manner in which their account would be treated for insurance purposes. As the court of appeals observed, however, the language of 12 C.F.R. 564.4 (1987) provided ample notice that the owner of a revocable trust account is ordinarily established at the time of the initial investment. Moreover, the FDIC had made clear in three publicly available insurance determinations—two dated prior to Vernon's failure and one dated prior to FSLIC's initial determination—that it would consider the original investor to be the owner of a revocable trust account in the absence of extrinsic evidence of a subsequent transfer. Pet. App. A7 (citing FDIC decisions).[5]

[5] Petitioners also argue (Pet. 24-27) that the FSLIC manual was subject to the notice-and-comment rulemaking procedures prescribed in the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.* That argument was not raised in the courts below, however, and petitioners are not entitled to advance it for the first time here. See, *e.g.*, *United States* v. *Williams*, 112 S. Ct. 1735, 1738-1739 (1992); *Ellis* v. *Dixon*, 349 U.S. 458, 460 (1955). In any event, the relevant provisions in the FSLIC manual are exempt from the notice-and-comment procedures of the APA. See 5 U.S.C. 553(b).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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